

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

THE NEW YORK TIMES COMPANY,

Plaintiff,

v.

MICROSOFT CORPORATION, OPENAI, INC.,
OPENAI LP, OPENAI GP, LLC, OPENAI, LLC,
OPENAI OPKO LLC, OPENAI GLOBAL LLC,
OAI CORPORATION, LLC, OPENAI
HOLDINGS, LLC,

Defendants.

Case No. 1:23-cv-11195-SHS-OTW

**OPENAI DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY
IN SUPPORT OF MOTION TO DISMISS**

Defendants Open AI, Inc., OpenAI L.P., OpenAI GP, L.L.C., OpenAI, L.L.C., OpenAI OpCo, L.L.C., OpenAI Global, L.L.C., OAI Corporation, L.L.C., and OpenAI Holdings, L.L.C. (collectively, "OpenAI"), by and through counsel, respectfully submit this Notice of Supplemental Authority to apprise the Court of a recent order that further supports Defendants' pending Motion to Dismiss (Dkt. 51).

On August 12, 2024, in *Andersen, et al. v. Stability AI LTD., et al.*, No. 23-cv-00201 (N.D. Cal.), the United States District Court for the Northern District of California granted Stability AI's motion to dismiss the claim under Section 1202(b) of the Digital Millennium Copyright Act ("DMCA") with prejudice "[b]ecause there are no allegations that any output from [Stability AI's product] was identical to a plaintiff's work." See Order Granting in Part and Denying in Part Motions to Dismiss First Amended Complaint, *Andersen*, No. 23-cv-00201, Dkt. 223 at 13 (attached hereto as Exhibit 1). In so holding, the Court reasoned that "Section 1202(b) claims require that copies be 'identical'" and "allegations stat[ing] that output[s]" from the product are "modification[s] of . . . licensed works, as opposed to an 'identical copy' . . . effectively plead[]" a plaintiff out of a Section 1202(b) claim. *Id.* at 12 (quoting *Doe I v. GitHub, Inc.*, No. 22-CV-06823, 2024 WL 235217, at *8 (N.D. Cal. Jan. 22, 2024)).

The Court’s decision in *Andersen* is relevant to OpenAI’s pending Motion to Dismiss the Times’s DMCA claim “because the outputs alleged in the Complaint are not wholesale copies of entire Times articles.” Dkt. 52 at 20. The Times argued that “[w]hether the outputs are ‘wholesale copies of entire Times articles’ is irrelevant.” Dkt. 73 at 19 (quoting Dkt. 52. at 20).

Dated: August 15, 2024

Respectfully Submitted,

By: /s/ Elana Nightingale Dawson

LATHAM & WATKINS LLP

Andrew M. Gass (*pro hac vice*)

andrew.gass@lw.com

Joseph R. Wetzel

joseph.wetzel@lw.com

505 Montgomery Street, Suite 2000

San Francisco, CA 94111

Telephone: 415.391.0600

Sarang V. Damle

sy.damle@lw.com

Elana Nightingale Dawson (*pro hac vice*)

elana.nightingaledawson@lw.com

555 Eleventh Street, NW, Suite 1000

Washington, D.C. 20004

Telephone: 202.637.2200

Allison L. Stillman

alli.stillman@lw.com

Luke A. Budiardjo

luke.budiardjo@lw.com

1271 Avenue of the Americas

New York, NY 10020

Telephone: 212.906.1200

By: /s/ Vera Ranieri

MORRISON & FOERSTER LLP

Joseph C. Gratz (*pro hac vice*)

jgratz@mofo.com

Vera Ranieri (*pro hac vice*)*

vrani@mofo.com

425 Market Street

San Francisco, CA 94105

Telephone: 415.268.7000

Allyson R. Bennett (*pro hac vice*)

abennett@mofo.com

Rose S. Lee (*pro hac vice*)

roselee@mofo.com

Eric K. Nikolaidis

enikolaidis@mofo.com

707 Wilshire Boulevard, Suite 6000

Los Angeles, CA 90017-3543

Telephone: 213.892.5200

By: /s/ Paven Malhotra

KEKER, VAN NEST & PETERS LLP

Robert A. Van Nest (*pro hac vice*)

rvannest@keker.com

Paven Malhotra*

pmalhotra@keker.com

Michelle S. Ybarra (*pro hac vice*)

mybarra@keker.com

Nicholas S. Goldberg (*pro hac vice*)

ngoldberg@keker.com

Thomas E. Gorman (*pro hac vice*)

tgorman@keker.com

Katie Lynn Joyce (*pro hac vice*)

kjoyce@keker.com

Sarah Salomon (*pro hac vice*)

ssalomon@keker.com

R. James Slaughter (*pro hac vice*)

rslaughter@keker.com

633 Battery Street

San Francisco, CA 94111-1809

Telephone: 415.391.5400

Attorneys for OpenAI Defendants

* All parties whose electronic signatures are included herein have consented to the filing of this document, as contemplated by Rule 8.5(b) of the Court's ECF Rules and Instructions.